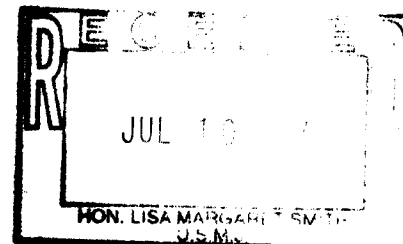


Vojtech Bystricky**Attorney and Counselor at Law****86 Longview Avenue****White Plains, NY 10605-1624****Telephone: 914-261-4416, Facsimile: 914-239-4822****Email: vbystricky@verizon.net**

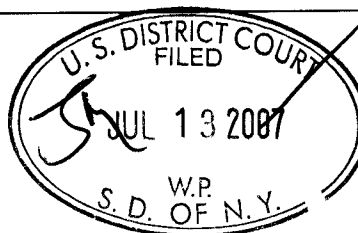
July 9, 2007

Hon. Lisa Margaret Smith, Chief U.S.M.J.

U.S. District Court, S.D.N.Y.

300 Quarropas Street, Room 428

White Plains, New York 10601



Via U.S. Priority Mail

MEMO ENDORSED**Re: Guzco v. Orion Builders, Inc., Case No. 06 Civ. 2789 (SCR)(LMS)**

USDC SDNY
DOCUMENT
ELECTRONICALLY FILE
DOC #:
DATE FILED:

Dear Judge Smith:

I represent the Defendants in the above-referenced civil action. I am writing to request that your Honor reconsider your Honor's Order of June 22, 2007. The basis for my request is the Defendants' desire to save time and resources, notwithstanding the apparent procedural impediments to this admittedly belated submission of the errata sheet attached herewith as Exhibit A.

My client Mr. Kvas believes the indicated answers given during his deposition testimony on October 23 & 24 are simply not true. Indeed, he will testify to exactly the opposite of what he said in those depositions with regard to the indicated questions. Mr. Kvas has realized the nature of Mr. Werner's questions only after his understanding of the issues involved as explained during the last conference before the Court. Mr. Kvas now realizes that "minimum wage" is a complex concept as contemplated by all the applicable provisions of the federal and state labor laws. He now understands that "minimum wage" does not refer merely to a \$5.15 - \$6.00/hr minimum wage.

Accordingly, my client respectfully requests permission to amend his answers to comport with what he believes to be the truth. In the alternative, we respectfully request, pursuant to Federal Rule of Civil Procedure 30(a)(2)(A), a leave of the Court to further depose Mr. Kvas. Mr. Kvas is prepared to cover the attendant costs.

In essence, Mr. Kvas will testify as follows:

Question 1 Did you pay Mr. Guzco and all other workers the federally and state required minimum base pay of \$5.15 to \$6.00 per hour during all relevant times?

Answer: Yes.

Question 2 Did you pay Mr. Guzco and all other workers one and a half time the base pay

Deemed letter motion. Motion denied. No reconsideration necessary or appropriate. Defendant may at his own cost, conduct a further deposition of defendant, at his own cost. deposition shall include as much examination on the subjects opened up by Mr. Kvas's testimony by Plaintiff's counsel. SO ORDERED Lisa Margaret Smith 7/13/07

for all hours worked in excess of 40 hours during any workweek during all relevant times?

Answer: Yes.

Question 3. Did you pay Mr. Cuzco and all other workers one extra hour at the minimum base hourly rate for any day when the worker worked more than ten hours during all relevant times?

Answer: Yes.

Question 4. During the relevant times, did you ever pay Mr. Cuzco and all other workers any bonus?

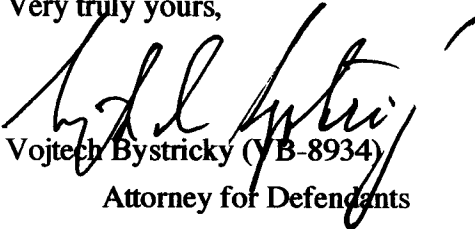
Answer: Yes.

Mr. Kvas will also readily admit that until the above-reference¹ conference before your Honor, he did not fully understand exactly how a trade custom of a so-called “flat” RATE evolved or even how exactly it complied with the federal and state labor laws. Mr. Kvas is not a legal expert or even an accountant. It is respectfully submitted that a *scienter* on his part is not a required element of compliance. The law does not require a knowing compliance, only compliance. Nevertheless, Mr. Kvas now fully understands that by adopting a trade custom “RATE”, listed as such on his time sheets, he was indeed in full compliance with all federal and state labor laws.

To demonstrate how this trade custom “RATE” works Mr. Kvas re-examined a few sample Time Sheets and Checks of Mr. Cuzco. During these periods the Plaintiff worked both more than 40 hours in a week and more than 10 hours on some of the days. The resulting calculations, including the application of an independent contractor bonus, are attached herewith as Exhibit B. Using very specific examples, already in the record in the instant case, my client demonstrates exactly how this trade custom “RATE” of payment to workers covered both employee and independent contractor status alternatives.

We respectfully submit to the Court that it would be much simpler and, indeed more efficient and less costly, to permit Mr. Kvas to submit the attached errata sheet. Nevertheless, as indicated above, Mr. Kvas is prepared to be deposed again. He believes his testimony must reflect the truth as reflected by the numbers already in the record – the Time Sheets & Checks to the Plaintiff and all other workers.

Very truly yours,



Vojtech Bystricky (VB-8934)
Attorney for Defendants

cc: Daniel Werner, Attorney for Plaintiff



BINDING PRODUCTS 800.926.1411

ERRATA SHEET

Re: SAUL MARCELO CUZCO v. ORION BUILDERS, INC. and Jan Kvas

The following corrections, additions or deletions were noted on the transcript of the testimony that I gave in the above-captioned matter, held on October 23, 2006.

PAGE(S): LINE(S): SHOULD READ:

23	6-10	Slavic languages – I am familiar with the essence of Slavic languages, like Polish and – but I do not -- and Czech. But I do not conduct any discourse in those languages, but they are related.
116	22-23	Yes.
117	3-6	Yes.
117	11-14	What is the question?
118	24	Yes.
119	4	Yes, if by “regular” rate you mean the \$8.50 to \$12.00 an hour paid my workers. This RATE included a base hourly wage of \$5.15 to \$6.00 an hour for up to 40 hours a week, plus one and one-half times that amount for overtime, if any, plus some other amounts.
119	8	Yes, if by “flat” rate you mean the \$8.50 to \$12.00 an hour paid my workers. This RATE included a base hourly wage of \$5.15 to \$6.00 an hour for up to 40 hours a week, plus one and one-half times that amount for overtime, if any, plus some other amounts.
119	15	Yes, because as I just told you, the flat rate that I paid my workers always included all the minimum required wages plus a little extra.
120	13-15	Yes.
120	21	Yes.
121	6	Yes.
121	11-12	Yes.
121	21	No. The answer is “I did pay an extra hour at the minimum wage.
122	8	No.

The following corrections, additions or deletions were noted on the transcript of the testimony that I gave in the above-captioned matter, held on October 24, 2006.

315	18	Yes.
-----	----	------

Jan Kvas

Subscribed and sworn to before me
this _____ day of _____ 2007

Worker: Saul Marcelo Cuzco

Week of: 04.07.2003

Time Sheet

Hours worked during the week of 04.07.2003						
Mon.	Tue.	Wed.	Thu.	Fri.	Sat.	Total hours
----	10.50	----	10.50	----	----	21.00

Check No. 1088	Amount: \$672.00	
	\$493.00	
	\$179.00	→ Payment for the week of 04.07.2003.

Calculations for

Independent contractor		total hours		flat /hr rate	total \$
	Total hours	21.00		\$8.50	\$178.50

(payment rounded off to **\$179.00**)**Calculations for**

Employee		total hours		base /hr rate	total \$
	upto 40 hrs	21.00	base pay	\$5.15	\$108.15
	over 40 hrs	0.00	overtime	\$7.73	\$0.00
	under NYSSL	0.00	spread of hours	\$5.15	\$0.00
	Total minimum wage required under FLSA/NYSSL				\$108.15

Calculations for

Bonus	Independent contractor agreement wage	\$179.00
	Employee minimum wage	-\$108.15
	Bonus	\$70.85

For the week of 04.07.2003 Mr. Cuzco was paid the required FLSA/NYSSL minimum wage of **\$108.15** plus a bonus of **\$70.85** for a total of **\$179.00**.

Worker: Saul Marcelo Cuzco

Week of: 04.14.2003

Time Sheet

Hours worked during the week of 04.14.2003						
Mon.	Tue.	Wed.	Thu.	Fri.	Sat.	Total hours
\$11.00	11.00	\$11.00	\$11.00	\$5.00	9.00	58.00

Check No. 1088Amount: **\$672.00**

\$179.00

\$493.00 → Payment for the week of 04.14.2003.

Calculations for

Independent contractor

	total hours		flat /hr rate	total \$
Total hours	58.00		\$8.50	\$493.00

Calculations for

Employee

	total hours		base /hr rate	total \$
upto 40 hrs	40.00	base pay	\$5.15	\$206.00
over 40 hrs	18.00	overtime	\$7.73	\$139.05
under NYSSL	4.00	spread of hours	\$5.15	\$20.60
Total minimum wage required under FLSA/NYSSL				\$365.65

Calculations for

Bonus

Independent contractor agreement wage	\$493.00
Employee minimum wage	-\$365.65
Bonus	\$127.35

For the week of 04.14.2003 Mr. Cuzco was paid the required FLSA/NYSSL minimum wage of **\$365.65** plus a bonus of **\$127.35** for a total of **\$493.00..**

WEEKLY TIME SHEET

NAME

Marcelo Cuzco.

	DATE	JOB NAME	START	END	TOTAL	
MON	14/4/03	Yorktown.	7:00	6:00	11.	
TUE	15/4/03		7:00	6:00	11	
WEN	16/4/03		7:00	6:00	11	
THU	17/4/03		7:00	6:00	11	
FRI	18/4/03		7:00	12:00	5	
SAT	19/4/03		7:00	4:00	9	
SAN						

TOTAL	RATE	AMOUNT
58	8.50.	493.

✓



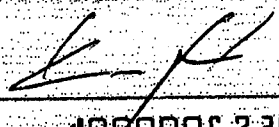
WEEKLY TIME SHEET

NAME

Maicelo Curco.

	DATE	JOB NAME	START	END	TOTAL	
MON	7/8/03	Yorktown.	—	—		
TUE	8/5/03	#5.	7:00	6:00	10 1/2.	
WEN	9/5/03	"	—	—		
THU	10/5/03	"	7:00	6:00	10 1/2.	
FRI	11/5/03	"	—	—		
SAT	12/5/03	"	—	—		
SAN						

TOTAL	RATE	AMOUNT
21.	\$8.50.	178.5

JAN KYAS DBA ORION CARPENTRY <i>296404</i>		1088
PH: 945-628-7617 899 LONG POND RD MAHOPAC, NY 10541-3339		1-108/210
<i>05/09/03</i>		DATE
PAY TO THE ORDER OF <i>Narciso Cruz</i>	\$ <i>672.00</i>	
<i>SIX HUNDRED SEVENTY TWO AND ~⁰⁰/₁₀₀</i>		DOLLARS 
HSBC 		
HSBC Bank USA Ossining, NY 10562		
FOR <i>9/7-12</i>	<i>4/19-19</i>	
⑆021001088⑆483789135⑆ 1088		⑆0000067200⑆

SHARLAND 2001

Worker: Saul Marcelo Cuzco

Week of: 09.27.2004

Time Sheet

Hours worked during the week of 09.27.2003						
Mon.	Tue.	Wed.	Thu.	Fri.	Sat.	Total hours
		\$10.00	6.50	\$10.50		27.00

Check No. 1567**Amount: \$940.00**

\$291.00 → Payment for the week of 09.17.2004.

\$649.00

Calculations for

Independent contractor

	total hours		flat /hr rate	total \$
Total hours	27.00		\$11.00	\$297.00

(payment rounded off to **\$291.00**)**Calculations for**

Employee

	total hours		base /hr rate	total \$
upto 40 hrs	27.00	base pay	\$5.15	\$139.05
over 40 hrs	0.00	overtime	\$7.73	\$0.00
under NYSSL	0.00	spread of hours	\$5.15	\$0.00
Total minimum wage required under FLSA/NYSSL				\$139.05

Calculations for

Bonus

Independent contractor agreement wage	\$291.00
Employee minimum wage	-\$139.05
Bonus	\$151.95

For the week of 09.27.2004 Mr. Cuzco was paid the required FLSA/NYSSL minimum wage of **\$139.05** plus a bonus of **\$151.95** for a total of **\$291.00**.

Worker: Saul Marcelo Cuzco

Week of: 10.04.2004

Time Sheet

Hours worked during the week of 10.04.2004						
Mon.	Tue.	Wed.	Thu.	Fri.	Sat.	Total hours
\$11.00	11.00	\$11.00	\$8.50	\$11.00	6.50	59.00

Check No. 1567Amount: **\$940.00**

\$291.00

\$649.00 → Payment for the week of 10.04.2004.

Calculations for

Independent contractor

	total hours		flat /hr rate	total \$
Total hours	59.00		\$11.00	\$649.00

Calculations for

Employee

	total hours		base /hr rate	total \$
upto 40 hrs	40.00	base pay	\$5.15	\$206.00
over 40 hrs	19.00	overtime	\$7.73	\$146.87
under NYSLL	4.00	spread of hours	\$5.15	\$20.60
Total minimum wage required under FLSA/NYSLL				\$373.47

Calculations for

Bonus

Independent contractor agreement wage	\$649.00
Employee minimum wage	-\$373.47
Bonus	\$275.53

For the week of 10.04.2004 Mr. Cuzco was paid the required FLSA/NYSLL minimum wage of **\$373.47** plus a bonus of **\$275.53** for a total of **\$649.00**.

WEEKLY TIME SHEET




NAME

Marcelo Cuzco

	DATE	JOB NAME	START	END	TOTAL		
MON	9/27/04	570m foot					
TUE	9/28/04						
WEN	9/29/04			10 ⁰²			
THU	9/30/04			6 ^{1/2}			
FRI	10/1/04			10 ^{4/2}			
SAT	10/2/04						
SAN							
					TOTAL	RATE	AMOUNT
					27	\$14	\$297

265 !! 291 ✓

2

JAN KYAS DBA ORION CARPENTRY PH. 845-223-7072 22 HIGH RIDGE ROAD HOREWELL JUNCTION, NY 12533-5559		1567
		1-108/210
DATE <u>10/24/09</u>		
PAY TO THE ORDER OF <u>Marcelo CUZCO</u>		\$ <u>940.00</u>
<u>NINE HUNDRED FORTY AND</u> <u>00</u> /100		DOLLARS 
HSBC 		
HSBC Bank USA Ossining, NY 10562		
FOR <u>9/27 - 10/9</u>		MP
⑆02⑆00⑆1088⑆483789⑆35⑆		⑆1567⑆
		⑆0000094000⑆

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